IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1899.

ANTONE MARKS,
Plaintiff in Error

vs.

J. M. SHOUP,
Defendant in Error

NO. 328

Error to the District Court in and for the District of Alaska.

BRIEF OF DEFENDANT IN ERROR.

S. M. STOCKSLAGER AND
GEORGE C. HEARD,
Attorneys for Defendant in Error.
ARTHUR K. DELANEY,
of Counsel.

STATEMENT OF CASE BY DEFENDANT IN ERROR.

Defendant in Error submits the following statement of the case, controverting the statement of the Plain-

tiff in Error, so far as the same is conflicting or inconsistent herewith. As disclosed by the pleadings and evidence the case is as follows:

1. On the 1st day of May, 1898, one Joe Levy was engaged in the mercantile business at Juneau, Alaska, and was then and there the owner and in possession of a certain stock of goods, contained in a certain store building on Seward street, the value of which stock of goods was about three thousand dollars ($3,000), and which was the sole and only property of said Levy in Alaska. (Transcript, pp. 3 and 4, 13–19.)

2. That said Levy was at that time largely indebted and practically insolvent, and a day or two afterwards attempted to transfer said stock of goods to Plaintiff in Error, and then absconded, for Japan, concealing himself aboard a steamer southward bound from Juneau, for that purpose. (Transcript, pp. 4–19.)

3. That said transfer was made with the intent to hinder, delay and defraud the creditors of said Levy, among whom were the Powers Dry Goods Co. of St. Paul, Minnesota, and the West Coast Grocery of Tacoma, Washington. (Transcript, idem.)

4. That for the purpose of collecting their claims, said companies brought their several actions against said Levy in the U. S. District Court of Alaska, a few days after he had absconded, and also caused writs of attachment to issue out of said Court, which were placed in the hands of the Defendant herein, then the U. S. Marshal for Alaska, for service, who under and by virtue of such writs, on or about the 16th day of May, A. D. 1898, duly levied upon the said stock of goods situated in said store building as the property of said Levy, and for the purpose of securing the payment of the said claims of the said companies. (Tran-

script, pp. 4, 5 and 15, 16, 18 and 19.) Service of summons in each case was had by publication. (Transcript, pp. 16 and 18.)

5. That afterwards, on the 5th day of October, A. D. 1898, said claims were severally merged into judgments, which still remain final adjudications of the said District Court, and on the same day executions were severally issued on said judgments, the said stock of goods levied upon and sold and such executions returned on the 24th day of October, 1898, satisfied in full. (Transcript, pp. 8–15, 16, 17, 18, 19.)

6. This action was brought in the Court below by Marks, the fraudulent vendee and Plaintiff in Error against Defendant in Error as Marshal, alone, for the value of the goods, and damages for levy and seizure thereof, and was tried by jury on the 3d day of December, 1898, upon the issues substantially stated above, which trial resulted in a verdict for Defendant in Error, which after motion for new trial, overruled, went to judgment on the 9th day of January, 1899. (Transcript, pp. 1–13 inclusive.)

This writ of error is brought from that judgment.

ARGUMENT.

1. The validity of the writs of attachment and levies thereunder.

The first five assignments of error hinge upon this proposition, and as all the questions raised have been repeatedly adjudicated by this Court, a mere citation of authorities will suffice.

Voorhees vs. Bank of U. S., 10 Peters 499; Book 9, L. C. P. Co's Ed., p. 490, foot paging.

Grignon et als vs. Astor et als., 2 Howard 319; Book 11, L. C. P. Co's Ed., p. 283, foot paging.

Cooper vs. Reynolds, 10 Wall 308; Book 19, L. C. P. Co's Ed., p. 931, foot paging.

Mathews vs. Densmore, 109 U. S. 206; Book 27 L. C. P. Co's Ed., p. 912, foot paging.

Kempe vs. Kennedy, 5 Cranch, 173; Book 3, L. C. P, Co's Ed., p. 70, foot paging.

Thompson vs. Tolmie, 10 Peters 449; Book 7 L. C. P. Co's Ed., p. 381, foot paging.

A consideration of the foregoing leads irresistably to the following conclusions:

(a) That the writs of attachment were valid and afforded a perfect protection to the Marshal, Defendant in Error, herein.

(b) That the levy upon and seizure of the goods, by the Marshal, thereunder, vested the Court with jurisdiction.

(c) That where jurisdiction appears, the proceedings of the Court cannot be collaterally attacked nor its errors or mistakes, if any, corrected, or examined, when brought up collaterally.

2. The question of fraud.

Fraud is confessed by the record. (Transcript, p. 19.) It is therefore not necessary to advert to the earmarks, which are so numerous and self-evident in the testimony on this question.

We call attention to consequences only; among which the following propositions are incontrovertable:

(a) The transfers from Levy through Levine and Kendall to Plaintiff in Error are void.

(b) And where this is the case the rights of creditors are the same as if the conveyances had never been made.

Statute of Oregon, Deady's Code, Sec. 51, p. 523.
Hill's Code, Vol. 2, Sec. 3059, p. 1373.

Out of the legion of authorities by the courts of last resort throughout the United States, construing this statute, we cite the following by the Supreme Court of Oregon.

Page et al. vs. Grant, 9 Oregon, 116–120.
Crawford vs. Beard, 12 idem 447, 8 Pac. 537.
Philbrick vs. O'Connor, 15 idem 15, 13 Pac. 612
Lyons vs. Leahy, 15 idem 8, 13 Pac. 643,

For discussion of the general questions involved, see

Patrick vs. Smith, 2 Pa. Super. Court 113.
Thomson et al. vs. Crane et al., 73 Fed. 327.
Dorrance vs. McAlester, 91 Fed. 614.
Sonnetheil vs. Brewing Co., 172 U S. 401.

3. The statute of frauds.

Under the testimony of the Plaintiff in Error, which is uncontradicted, the contracts of sale are clearly within this statute. (Transcript, p. 14.)

Hill's Code, Vol. 2, p. 1373.

Among the multitude of authorities construing this statute, we cite as especially in point,

Newman vs. Newman, 7 Kan. App. 77, 52 Pac. 908.

In any event the contract of loan between Plaintiff in Error and Levy is void for usury, as Plaintiff in Error exacted only the modest sum of five per cent. per month or sixty per cent. per annum interest; and his testimony as to this is also uncontradicted. (Transcript, p. 14.)

This contract is in violation of the statute.

2. Hill's Code, pp. 1559 and 1660.

And contract is void.

In re Pittock, 2 Sawyer 416; U. S. vs. 372 Pipes Spirits, 5 idem 421.

Bank of U. S. vs. Owens, 2 Peters U. S. 536; Book 7, L. C. P. Co's Ed., p. 508, bottom paging.

Obviously, Plaintiff in Error cannot recover on this contract and has no standing in Court under it. Hence the instruction complained of in the sixth Assignment of Errors (Transcript, p. 30), if erroneous, is harmlessly so.

The judgment of the Court below, therefore, should be affirmed.

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